

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Section 73.202(b),)
FM Table of Allotments,)
FM Broadcast Stations.)
(Banks, Redmond, Sunriver and Corvallis) MM Docket No. 96-7
Oregon) RM-8732
) RM-8845
In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 96-12
FM Table of Allotments,) RM-8741
FM Broadcast Stations.)
(The Dalles and Corvallis, Oregon))
)
In re Application of)
)
Madgekal Broadcasting, Inc.) File No. BPH-960206IE
Station KFLY(FM), Corvallis, Oregon)
)
For Construction Permit to Modify Licensed)
Facilities (One-Step Upgrade))

DISPATCHED

MEMORANDUM OPINION AND ORDER

Adopted: May 25, 2004

Released: May 27, 2004

By the Commission:

1. The Commission has before it an Application for Review filed jointly by Madgekal Broadcasting, Inc. ("MBI") and Jacor Licensee of Louisville, Inc., former and current licensee, respectively ("Petitioners"), of Station KFLY (FM), Corvallis, Oregon. Petitioners seek Commission review of the *Memorandum Opinion and Order* ("MO&O")¹ reaffirming the *Report and Order*² in this proceeding. Infinity Radio License, Inc. ("Infinity"), licensee of Station KVMX-FM (formerly KBBT), Banks, Oregon,³ filed a response that supports in part but generally opposes the Application for Review. LifeTalk Broadcasting Association ("LifeTalk") filed an opposition to the Application for Review. Petitioners filed a Reply. For the reasons set forth below, we deny the Application for Review.

¹ Banks, Redmond, Sunriver, Corvallis, et al., Oregon, 16 FCC Rcd 2272 (MMB 2001) ("MO&O").

² Banks, Redmond, Sunriver, Corvallis, et al., Oregon, 13 FCC Rcd 6596 (MMB 1998) ("Consolidated R&O").

³ Infinity superseded CBS Radio License, Inc., which superseded American Radio Systems, Inc. as licensee of Station KBBT.

Background

2. This case originated as two separate rulemaking proceedings. In the first proceeding, MM Docket 96-7, the staff issued a *Notice of Proposed Rule Making and Order to Show Cause* for Banks and Redmond, Oregon.⁴ The staff released *Banks NPRM* on February 6, 1996, in response to a rulemaking petition filed by Common Ground Broadcasting, proposing to upgrade Station KVMX(FM) (formerly KBBT-FM), Channel 298C2, Banks, Oregon. Specifically, *Banks NPRM* proposed the substitution of Channel 298C1 for Channel 298C2 at Banks and the modification of the license for Station KVMX(FM) accordingly. To accommodate the Banks upgrade, *Banks NPRM* also proposed the substitution of Channel 269C2 for Channel 298C2 at Redmond, Oregon, and the modification of the license for Station KLRR, Redmond, Oregon, to specify the substitute channel.⁵ In the second proceeding, MM Docket 96-12, the staff released a *Notice of Proposed Rule Making* for The Dalles, Oregon⁶ on February 13, 1996, in response to a rulemaking petition filed on November 20, 1995 by LifeTalk. LifeTalk's rulemaking petition proposed the allotment of Channel *256C3 at The Dalles, Oregon, with a 22.3 kilometer site restriction and its reservation for noncommercial educational use. However, *The Dalles NPRM* proposed the allotment of Channel *268C3 at The Dalles and its reservation for noncommercial educational use to avoid a potential city-grade signal coverage problem that could result from the Channel *256C3 reference coordinates.

3. These two unrelated rulemaking proceedings became technically related by the filing of an application by MBI on February 6, 1996, proposing a one-step upgrade for Station KFLY(FM), Corvallis, Oregon. Specifically, MBI proposed the substitution of Channel 268C for Channel 268C2 at Corvallis and the modification of the license for Station KFLY(FM) accordingly. Since the use of Channel 268C at Corvallis is short-spaced and mutually exclusive to both Channels 269C2 at Redmond, proposed in *Banks NPRM*, and to Channel *268C3 at The Dalles, proposed in *The Dalles NPRM*, the staff issued a *Public Notice*,⁷ treating the Corvallis application as a counterproposal in both MM Dockets 96-7 and 96-12, and the dockets were consolidated for consideration.

4. While the case was pending, the licensees at Banks and Corvallis submitted a joint settlement agreement in which the Banks, Redmond, and The Dalles proposals would be granted, with a slight change of site at The Dalles. The settlement also provided that Petitioners be paid \$950,000 for agreeing to modify their application to specify Channel 268C1 at Corvallis rather than Channel 268C. The parties proposed the allotment of Channel *268C3 at The Dalles at a location near the site proposed in the *Dalles NPRM*.

5. In *Consolidated R&O*, the Mass Media Bureau denied the settlement. The Bureau held that the settlement violated Section 1.420(j) of the rules because MBI would receive payment in excess of its legitimate and prudent expenses incurred in preparing and prosecuting its application. The Bureau rejected Petitioners' argument that Section 309 of the Communications Act of 1934, as amended,

⁴ *Banks and Redmond, Oregon*, 11 FCC Rcd 1686 (MMB 1996) ("*Banks NPRM*").

⁵ The licensee of Station KLRR(FM) is Combined Communications, Inc.

⁶ *The Dalles, Oregon*, 11 FCC Rcd 1788 (MMB 1996) ("*The Dalles NPRM*").

⁷ *Public Notice* was given on June 5, 1996, Report No. 2135.

required the approval of the settlement.⁸ The Bureau then did a comparative analysis and held that the public interest was better served by the combination of the upgrade at Banks and the Channel 268C3 allotment to The Dalles, as the community's first local noncommercial educational service, rather than the upgrade at Corvallis alone, which would only have expanded service by an existing voice.⁹ It thus granted the upgrade of Station KVMX(FM), Banks, Oregon, from Channel 298C2 to Channel 298C1, and the related substitution of Channel 269C2 for Channel 298C2 at Redmond, in combination with the allotment of Channel *268C3 at The Dalles, although the latter allotment was made at a different reference site than the one proposed in *The Dalles NPRM*. The *Consolidated R&O* also denied the one-step upgrade application for Station KFLY at Corvallis from Channel 268C2 to Channel 268C. A non-conflicting allotment, Channel 224C2 at Sunriver, Oregon also was granted.¹⁰

6. On reconsideration, Petitioners challenged the Bureau's denial of the settlement agreement. They contended again that the staff should have approved the agreement pursuant to Section 309(l) of the Communications Act of 1934, as amended, and that the settlement does not violate Section 1.420(j) of the Commission's rules. Alternatively, if the Commission did not approve the settlement, Petitioners argued that the comparative analysis in the *Consolidated R&O* was flawed and should be reexamined because Channel *268C3 was improperly allotted at The Dalles. Petitioners contended that had the staff properly rejected The Dalles Channel *268C3 allotment, it would have been required to compare the Banks and Corvallis upgrades. They claimed that the Corvallis upgrade would prevail since its net population gain was greater than that of the Banks upgrade.

7. In support of its position that Channel *268C3 was improperly allotted at The Dalles, Petitioners made five arguments, most of which were contained in an engineering exhibit, the McClanathan Report. First, Petitioners alleged that a reserved band frequency is available at The Dalles, obviating the need to allot a non-reserved FM channel at The Dalles for noncommercial educational use. Second, contrary to the Commission's reasoning in *The Dalles NPRM*, Petitioners argued that there is another site for Channel *256C3 at The Dalles, from which the requisite city-grade coverage can be provided to The Dalles, thereby eliminating the need to allot Channel *268C3 at The Dalles. Third, the McClanathan Report contended that a fully spaced station operating on Channel *268C3 at The Dalles would not be able to place a city-grade signal over The Dalles. Fourth, Section 73.208(a)(3)(iii) of the Rules should have precluded consideration of Channel *268C3 at the Dalles because LifeTalk's rulemaking petition, filed on November 20, 1995, did not conflict with MBI's one-step upgrade application, filed on February 6, 1996. Petitioners contend that the conflict only arose with the February 13, 1996, release of *The Dalles NPRM*, proposing the allotment of Channel *268C3 at The Dalles. Fifth, they argued that LifeTalk failed to state affirmatively that it would build the requisite tall tower at The Dalles, as requested in *The Dalles NPRM*.

8. The *MO&O* adopted and released in January 2001 held that denial of the settlement agreement was consistent with Section 1.420(j) of the Rules and Section 309(l) of the Communications Act of 1934, as amended, for the same reasons set forth in the *Consolidated R&O*. In addition, the *MO&O* denied reconsideration of the comparative analysis because, of the five arguments set forth in the

⁸ 47 U.S.C. § 309(i)(3) directed the Commission to waive any rules necessary to permit agreements to remove conflicts between certain applications. The Bureau held that this section does not apply to petitions for rulemaking to amend the FM Table of Allotments. See also *MO&O*, *supra*, n. 1.

⁹ See *Banks, Redmond, Sunriver, Corvallis, et al., Oregon*, 13 FCC Rcd at 6604-05.

¹⁰ *Id.*

preceding paragraph, arguments (1) through (4) rely on new facts not previously presented to the Commission. Since these new facts related to issues that were in play prior to the issuance of the *Consolidated R&O* in this case, they do not fall within the exceptions for considering new matter under Section 1.429(b) of our rules.¹¹ The fifth argument was rejected by the *MO&O* because it was properly addressed in the *Consolidated R&O*.

Application for Review

9. In their Application for Review, Petitioners again allege that the Bureau erred when it denied the settlement, repeating the same arguments raised below. Alternatively, if the Commission declines to approve the settlement agreement, Petitioners' reargue that their one-step upgrade application for the Corvallis station should be granted because Channel *268C3 was improperly allotted to The Dalles and because The Dalles proceeding should not have been consolidated with the Banks proceeding. In support of this position, Petitioners contend that the staff should have considered the four arguments made in the McClanathan Report and the petition for reconsideration on the propriety of allotting Channel *268C3 at The Dalles because Section 1.429(b)(3) of the Rules permits the Commission to consider new matter on reconsideration if it "determines that consideration of the facts is in the public interest." They argue that since this is a rulemaking proceeding, "all pertinent facts presented should be considered before the Commission makes its final decision."¹² Further, if the Commission would consider the four new arguments that were not examined on the merits at the reconsideration stage, the comparative analysis would change because the allotment of a channel at The Dalles would not be included and that, under established precedent, the Corvallis upgrade would prevail over the Banks upgrade. Finally, Petitioners again argue that LifeTalk's failure to state affirmatively that it would build the requisite tall tower for Channel *268C3 at The Dalles rendered its expression of interest defective.

Responsive Pleadings

10. In its Response to the Application for Review, Infinity asserts that Petitioners essentially reiterate the arguments made in their Petition for Reconsideration. Infinity submits a copy of its Response to Petition for Reconsideration. Therein, Infinity continues to support approval of the settlement agreement. However, in the event that the Commission concludes that the Bureau correctly rejected the settlement agreement, Infinity contends that the Commission should also affirm the Bureau's decision to grant the Banks upgrade. In support of this position, Infinity argues that the Commission should not consider Petitioners' arguments concerning Channel *268C3 under Section 1.429(b) because their acceptance is not in the public interest and because Petitioners offer no explanation for belatedly raising these four new arguments. Further, Infinity submitted an engineering report by Clarence Beverage, challenging the McClanathan Report and seeking to demonstrate that (1) there is no reserved frequency available at The Dalles; (2) a fully-spaced station operating on Channel *268C3 can provide a 70 dBu city-grade contour over The Dalles from both the transmitter sites used in the *Report and Order* and as proposed in *The Dalles NPRM*; and (3) the non-conflicting channel that Petitioners proposed to allot to The Dalles, Channel 256C3, is inferior to Channel *268C3. Moreover, Infinity also contended that the Commission did not violate its cut-off rules by putting out Channel 268C3 for comment at The Dalles and that LifeTalk adequately responded to the tall tower construction issue.

11. Finally, Infinity notes that on August 27, 1998, the Bureau issued a construction permit,

¹¹ See *The Dalles, Oregon*, 11 FCC Rcd 1788 (1996).

¹² Application for Review at 11.

authorizing an upgrade of Station KVMX(FM), Banks, Oregon, from Channel 298C2 to Channel 298C1. Infinity adds that it completed construction and has been operating the station with the upgraded facilities since February, 1999. Further, Station KLRR(FM), Redmond, Oregon, has changed channels to accommodate this upgrade, and the costs of the channel change were reimbursed by Infinity. Accordingly, Infinity contends that to unravel this proceeding would create undue hardship and is an additional basis for affirming the Bureau's decision.

12. In its Opposition to Application for Review, LifeTalk states that its primary concern in this proceeding is the establishment of an allotment at The Dalles. Since an allotment at The Dalles can be made with or without the settlement, LifeTalk does not take a position on the settlement proposal. However, in the event the Commission affirms the Bureau's rejection of the settlement proposal, LifeTalk argues that it should affirm the Bureau's initial ruling, which included the allotment of Channel *268C3 at The Dalles. Like Infinity, LifeTalk contends that the issues of whether a channel in the reserved band was available at The Dalles and whether the channel originally requested for The Dalles (i.e., Channel *256C3) could provide city-grade coverage to that community were raised and discussed in *The Dalles NPRM*. LifeTalk asserts that these issues "were well-publicized in this proceeding by the time of the Commission's public notice on June 5, 1996 that MBI's application was mutually exclusive with the proposals in both Docket 96-7 and Docket 96-12. Yet, MBI's comments were completely silent on these issues."¹³ LifeTalk argues that Petitioners did not show why they could not have produced these arguments earlier and that they should not be permitted to make them now. LifeTalk also argues that the *Consolidated R&O* and *MO&O* properly interpreted LifeTalk's affirmative statement to build a tall tower for Channel *268C3 at The Dalles.

13. In reply, Petitioners note that neither Infinity nor LifeTalk oppose approval of the proposed settlement. Petitioners contend that "[g]iven the length of time this case has been pending, the unique context in which the proposed settlement arose and the benefits accruing to all parties from approval of the settlement, such approval would be in the public interest."¹⁴ Second, Petitioners argue that the Commission's cut-off rule precluded allotment of Channel *268C3 to The Dalles. The Corvallis one-step upgrade application was subjected to comparative consideration only because the staff failed to follow their procedural rules. Accordingly, Petitioners claim The Dalles allotment must be rescinded. Third, Petitioners argue that "the fact Infinity chose to construct KVMX's upgraded facilities [at Banks] before the case was over does not and cannot improve its comparative posture if the settlement is not approved."¹⁵ Petitioners base this argument on the Commission's decision to eliminate its automatic stay rule and its warning therein that "parties electing to proceed before the allotment decision is final do so at their own risk and must bear the cost of any subsequent action reversing or revising the allotment decision."¹⁶ While Infinity should gain no advantage by constructing before finality in this proceeding, Petitioners argue that this fact is one more reason for approval of the settlement, which would leave undisturbed the Banks upgrade and Redmond substitution.

¹³ LifeTalk's Opposition to Application for Review at 4.

¹⁴ Petitioners' Reply at 2-3.

¹⁵ *Id.* at 5.

¹⁶ *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders*, 11 FCC Rcd 9501, ¶ 11 (1996).

Discussion

14. After careful consideration of the record in this proceeding, we deny the Application for Review and affirm the allotments made in the *Consolidated R&O* with one minor technical adjustment. First, we affirm the staff's denial of the settlement agreement for the reasons set forth in both the *Consolidated R&O* and *MO&O*. The staff is correct that the settlement violated Section 1.420(j) of the rules because the payment MBI would receive was in excess of its legitimate and prudent expenses. In addition, the explicit wording and legislative history of Section 309(l)(3) of the Communications Act of 1934, as amended, support the staff's conclusion that the waiver provisions for settlements for profit in that section do not apply to mutually exclusive FM rulemaking allotment proposals. Nothing new has been presented that warrants changing the staff's resolution of this issue. Accordingly, the staff properly denied the Section 1.420(j) waiver request and proposed settlement.

15. Second, with regard to the arguments raised in the McClanathan Report relating to the allotment of Channel *268C3 at The Dalles, we believe that it is appropriate to consider this new information and the Clarence Beverage response, insofar as they concern the issue of city-grade coverage to The Dalles on Channel *268C3. *The Dalles NPRM* proposed a different set of reference coordinates than were actually used in the *Consolidated R&O*. Since the parties had no prior opportunity to evaluate this site, it was appropriate to permit the submission of materials at the reconsideration stage on the issue of whether The Dalles would receive city-grade coverage. Further, the Commission has an obligation to ensure the technical viability of any allotment.

16. Based on our own engineering analysis, we now recognize that a maximum Class C3 station operating from the reference coordinates specified in *Consolidated R&O*¹⁷ would not place a city-grade signal over the entire community because the site is too far from The Dalles.¹⁸ Rather, the signal would cover 97 percent of the area within the boundaries of The Dalles. To rectify this problem, we will change the reference coordinates to those proposed in *The Dalles NPRM*.¹⁹ In making this change in the reference coordinates, we acknowledge that the McClanathan Report purports to demonstrate that terrain obstructions at *The Dalles NPRM* site for Channel *268C3 at The Dalles will cause severe shadowing over The Dalles, notwithstanding that the site is only 8.9 kilometers from the center of The Dalles.²⁰ The Beverage Report, submitted by Infinity, seeks to refute this allegation. By using the Commission's F (50, 50) curves, Beverage concludes that the city-grade (*i.e.*, 70 dBu) contour will cover 100 percent of The Dalles. Further, noting that there is widely varying terrain, the Beverage Report conducted a Longley-Rice propagation analysis from *The Dalles NPRM* site to the community. It concludes that the city-grade contour travels further than the boundaries of The Dalles, illustrating 100 percent city-grade coverage of The Dalles.

¹⁷ The reference coordinates for Channel *268C3 at The Dalles specified in the *Consolidated R&O* were 45-34-00 NL and 120-55-00 WL.

¹⁸ At the allotment stage, the Commission requires 100% community coverage with a city-grade signal. *Caldwell, College Station, Gause, Texas*, 15 FCC Rcd 3322 (2000); *Greenwood, Seneca, Aiken and Clemson, South Carolina and Biltmore Forest, North Carolina*, 3 FCC Rcd 4108 (1988).

¹⁹ The new reference coordinates for Channel *268C3 at The Dalles are 45-31-28 NL and 121-07-22 WL.

²⁰ The McClanathan Report also argues that severe shadowing would occur from the *Consolidated R&O* reference coordinates for Channel *268C3 at The Dalles. This argument is moot in view of our changing the reference coordinates for this allotment to those proposed in *The Dalles NPRM*.

17. We find the McClanathan Report unpersuasive on this issue. Although the McClanathan Report sought to identify terrain obstructions, it performed no computations for the 70 dBu signal level based on the terrain profiles provided. On the contrary, our staff engineering analysis confirms that using the standard propagation method F (50, 50) curves, at an effective radiated power (ERP) of 25 kW and a height above average terrain (HAAT) of at least 100 meters,²¹ a station operating from *The Dalles NPRM* site will place a city-grade signal over 100% of The Dalles. Consequently, Channel *268C3 is technically viable.

18. Third, we also will consider Petitioners' argument regarding whether the allotment of Channel *268C3 was precluded by our cut-off rules. While this argument is raised late, we will consider it in light of judicial precedents regarding deficient cut-off procedures.²² We conclude that the allotment of Channel *268C3 at The Dalles was not precluded by our cut-off rules. Although *The Dalles NPRM*, which proposed conflicting Channel *268C3 in lieu of LifeTalk's request for non-conflicting Channel *256C3 at the Dalles, was released on February 13, 1996, and the Corvallis application was filed seven days earlier on February 6, 1996, the proposed use of Channel *268C3 in *The Dalles NPRM* was permissible because LifeTalk had identified Channel *268C3 before the Corvallis application was filed. Specifically, LifeTalk suggested the availability of Channel *268C3 in its original rulemaking petition, which was filed on November 20, 1995. The Commission's procedures permit the use of alternative channels. The use of an alternate channel under these circumstances is clearly authorized for resolving conflicts between applications and rulemaking petitions. "If one or more parties to the rulemaking proceeding suggest an alternative channel and reference coordinates in a pleading filed before the FM application is entitled to cut-off protection, we believe that the alternative channel may be considered."²³ The rationale for this approach is that use of the alternate channel would not create unfairness to the applicant because it had been clearly suggested before the application was filed. Since LifeTalk not only proposed Channel *268C3 but also submitted reference coordinates and a spacing study before the Corvallis application was filed, its use falls within this policy.

19. However, Petitioners further contend that LifeTalk did not propose any alternate channels but instead identified three channels, including Channel *268C3, that remained available for commercial operation in the event that Channel *256C3 were allotted and reserved for noncommercial use. We disagree. While LifeTalk introduced the availability of other commercial channels as part of its justification for reserving Channel 256C3 for noncommercial use, we believe that it is appropriate to consider these channels as alternate channels in the event that there are technical or legal problems with the original proposal because the level of detail submitted comports with the requirements of the *Conflicts R&O* – that is, Channel *268C3 was identified and reference coordinates were provided. Under these circumstances, there is sufficient notice to parties that these channels may be considered, if they are needed. By way of contrast, it would not be reasonable to use a conflicting channel such as Channel *268C3 if LifeTalk had generally stated that other channels were available but had not identified them or

²¹ A station with an antenna height of 100 meter HAAT requires 191.5 meters above ground level (AGL). By way of contrast, in *The Dalles NPRM*, we stated that a tower of at least 209 meters AGL would be necessary at this same site.

²² See, e.g., *The Way of Life Television Network, Inc. v. FCC*, 593 F.2d 1356 (D.C. Cir. 1979) (failure to publish a cut-off list in Federal Register invalidated the announced cut-off date); *Florida Institute of Technology v. FCC*, 952 F.2d 549 (D.C. Cir. 1992) (cut-off list released in violation of our rules has no legal effect).

²³ *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments* ("Conflicts R&O"), 7 FCC Rcd 4917, ¶13 (1992).

provided reference coordinates.

20. Fourth, we will not consider Petitioners' new arguments concerning the availability of either reserved band channels or Channel *256C3 at The Dalles and affirm the *MO&O's* decision not to consider these arguments. These grossly untimely contentions were advanced more than two years after the comment date in MM Docket No. 96-12. Under Section 1.429(b) of our Rules, any party relying on new facts must show that these facts or circumstances occurred after the last timely opportunity to present them to the Commission, could not have presented them to the Commission through ordinary diligence, or consideration is required in the public interest.²⁴ Our allotment process cannot operate efficiently if we allow a party to sit back and hope for a decision in its favor and, then, when an adverse decision is rendered, proffer additional submissions or options.²⁵ Petitioners have made no effort to show why they could not have advanced these contentions by the reply comment date established in the *Public Notice* announcing the acceptance of the Corvallis application as a counterproposal in both MM Dockets 96-7 and 96-12. Indeed, it appears that Petitioners' true intention was to pursue the settlement rather than the grant of its application.

21. We do not believe that consideration of these contentions is now required in the public interest under Section 1.429(b)(3) of our Rules. While we do not know whether a reserved channel was available or that Channel *256C3 could have been allotted at a different site at The Dalles at the end of the pleading cycle in this proceeding, it now appears that we could grant a reserved Channel 215 application (at a power of 200 watts) or allot Channel *256C3 to The Dalles at a different site in compliance with our technical rules. This outcome, however, would not serve the public interest. Assuming, *arguendo*, the allotment of Channel *256C3 at The Dalles, our resolution of this proceeding would be based on a comparison of the net population gains between the proposed Station KVMX Class C1 upgrade at Banks and the proposed Station KFLY Class C upgrade at Corvallis. The upgrade serving the larger number of persons would have the greater public interest benefit.²⁶ In this instance, the Class C1 upgrade at Banks enables Station KVMX to serve an additional 272,653 persons. On the other hand, Station KFLY(FM) at Corvallis is now a Class C0 facility. Under *Greenup, Kentucky and Athens Ohio*,²⁷ a coverage prediction for a Class C station is determined by assuming an ERP of 100 kW and "either the authorized HAAT for existing stations or the Class C minimum HAAT ... for vacant allotments."²⁸ As a

²⁴ 47 C.F.R. § 1.429(b) (party relying on new facts must show that these facts (1) relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission; (2) were unknown to it until after its last opportunity to present them to the Commission, and it could not, through the exercise of ordinary diligence, have learned of the facts in question until after the last opportunity; or (3) the consideration of these facts would serve the public interest).

²⁵ See *Colorado Radio v. FCC*, 118 F. 2d 24 (D.C. Cir. 1941).

²⁶ See *Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, and Rogers, Arkansas*, 10 FCC Rcd 12014 (MMB 1995); *Bowling Green and Elizabethtown, Kentucky, and Ferdinand, Indiana*, 8 FCC Rcd 2097 (MMB 1993).

²⁷ *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991) ("*Greenup*").

²⁸ *Greenup*, 6 FCC Rcd at 1497 n.7 (1991). At the time that *Greenup* was decided, the minimum Class C HAAT was 300 meters, but after the creation of the new C0 Class, the minimum Class C HAAT became 451 meters. See *Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 15 FCC Rcd 21649 (2000); 47 C.F.R. §73.211. The Corvallis application for upgrade, filed before the C0 rule change, proposed a Class C (continued....)

Class C0 facility, Station KFLY may now operate at an ERP of 100 kilowatts at an antenna height of 450 meters. In comparison, the minimum Class C facility is an ERP of 100 kilowatts at 451 meters HAAT. As such, upgrading Station KFLY from Class C0 to a full Class C would result in a minimal service gain. This is not a sufficient public interest benefit that would now warrant granting review or reversing the staff decision in this proceeding.

22. The Commission has rejected late filed "new" matter in other cases. For example, in *National Telecom PCS, Inc.*,²⁹ we denied review of an applicant's petition for reconsideration of its denial of a waiver of the bid withdrawal payment rule. It was insufficient to argue that the Commission had granted another party a waiver and that it deserved one as well while making no other showing as to its own waiver request. In *Educational Information Corporation*,³⁰ we denied reconsideration of a waiver denial when NCE Station WCPE(FM) submitted "voluminous" new information in support of that waiver which it could have presented earlier through the use of ordinary diligence. In *Herbert L. Schoenbohm, Kingshill, Virgin Islands*,³¹ we denied reconsideration of nonrenewal of license when the party seeking reconsideration submitted taped evidence of an *ex parte* contact by the judge during the course of the renewal matter. The Commission found that this evidence was submitted too late and stated, "it is incumbent on an applicant to present his arguments as early as possible; it may not rest on its rights in the hope that the passage of time will improve its position."³² Finally, in *Carolyn S. Hagedorn*,³³ we held that reconsideration of an application denial was not proper when the petition for reconsideration was based on new information regarding failure to construct that could have been submitted while the application was pending, and there was no public interest reason to allow the information to be considered. The Commission stated, "Commission policy, as reflected by the rule, encourages applicants and others to provide complete information at an early stage, thereby minimizing the need for reconsideration proceedings. Our processes operate inefficiently at best when, as here, facts are presented piecemeal."³⁴

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HAAT of 335 meters at an ERP of 100kW. Since the facilities proposed in the application are below the current minimum HAAT for a Class C, we assume, pursuant to Greenup, the Class C minimum HAAT of 451 meters for Station KFLY at Corvallis.

²⁹ See *National Telecom PCS, Inc.*, 14 FCC Rcd 18822 (1999); *aff'd sub nom.*, *National Telecom PCS, Inc. v. FCC*, 254 F.3d 316 (2000).

³⁰ See *Educational Information Corporation*, 13 FCC Rcd 23746 (1998).

³¹ See *Herbert L. Schoenbohm, Kingshill, Virgin Islands*, 13 FCC Rcd 23774 (1998), *aff'd sub nom. Herbert L. Schoenbohm v. FCC*, 204 F.3d 243 (2000), *cert. den.* 531 U.S. 968 (2000).

³² Citing *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941).

³³ See *Carolyn S. Hagedorn*, 11 FCC Rcd 1695 (1996).

³⁴ Citing *Colorado Radio Corp. v. FCC*, 118 F. 2d 24, 26 (D.C. Cir. 1941). Conversely, we have allowed information to be submitted on reconsideration when it is in the public interest to do so. In *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz bands for Broadcast Satellite-Service Use*, 16 FCC Rcd 19808 (2001), we granted reconsideration of one aspect of our decision regarding uses of the 18 GHz band and revised that decision based on a balance of equities between satellite and terrestrial uses of that band. We determined that those changes would promote the efficient use of spectrum for (continued....)

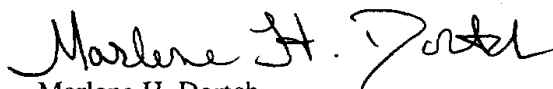
23. Having determined that only two of the four "new" arguments should be considered at this stage of the proceeding and that the permissible "new" matter did not affect the viability of the allotment of Channel *268C3, we turn our attention to Petitioners' final argument that the *Consolidated R&O* and *MO&O* did not properly interpret LifeTalk's affirmative response to *The Dalles NPRM* that it would build a tall tower for Channel *268C3. As with the approval of the settlement agreement, this argument has been thoroughly analyzed in the *Consolidated R&O* and was affirmed in the *MO&O*. We agree with the staff's analysis and disposition of this issue and adopt its reasoning. LifeTalk has sufficiently indicated that it would build a tower with the requisite height to provide city-grade coverage to The Dalles.

24. In view of the above, we conclude that Channel *268C3 was properly allotted to The Dalles³⁵ and included in the comparative analysis. Further, we conclude that the comparative analysis in this case was correct because under Priority (4) of the FM Allotment Priorities, granting the upgrade at Banks and allotting and reserving Channel *268C3 for noncommercial educational use at The Dalles outweighed granting the Corvallis upgrade.³⁶

25. ACCORDINGLY, IT IS ORDERED That, pursuant to 47 C.F.R. §1.115(g), the Application for Review filed jointly on March 12, 2001, by Madgekal Broadcasting, Inc. and Jacor Licensee of Louisville, Inc., IS DENIED.

26. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

(Continued from previous page) _____

existing and future users. As indicated in paragraph 21 *supra*, no such public interest benefits are present in the instant case.

³⁵ Notwithstanding this determination, we reject as meritless Infinity's contention that modification of The Dalles Channel *268C3 allotment should not be considered because it would cause undue hardship. The licensees of KVMX(FM) and KLRR(FM) modified their facilities based on non-final construction permits. In so doing, they assumed all risks associated with challenges to these authorizations. *See also* n. 16, *supra*, and accompanying text.

³⁶ Priority (4) of the FM Allotment priorities is "other public interest matters." *Revision of FM Assignment Policies and Procedures*, 90 F.C.C. 2d 88, 91 (1982).